

E-132, 299/SA-90-36 REQUIRING CESSATION OF PROVISION OF SERVICE AND
REQUESTING ENFORCEMENT ACTION BY THE ATTORNEY GENERAL

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Darrel L. Peterson	Chair
Cynthia A. Kitlinski	Commissioner
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In the Matter of a Complaint of People's Cooperative Power Association, Inc. Against the City of Rochester Regarding Extension of Service to Intersections of 37th Street, N.E. and East River Road and 37th Street, N.E. and North Broadway

ISSUE DATE: March 9, 1990

DOCKET NO. E-132, 299/SA-90-36

ORDER REQUIRING CESSATION OF PROVISION OF SERVICE AND REQUESTING ENFORCEMENT ACTION BY THE ATTORNEY GENERAL

PROCEDURAL HISTORY

On January 19, 1990, People's Cooperative Power Association, Inc. (People's or the co-op) filed a complaint alleging that the City of Rochester (the City) had extended service to two intersections within People's exclusive service area in violation of Minnesota's assigned service area statutes, Minn. Stat. §§ 216B.37 et seq. (1988). People's asked the Commission to order the City to cease providing service and to refer the alleged statutory violation to the Attorney General for the assessment of penalties under Minn. Stat. §§ 216B.57 et seq. (1988).

The City filed an answer admitting that the intersections lay within People's assigned service area as originally established by the Commission and as reflected in the official service area maps. The City alleged, however, that the service area boundaries had been changed, or that People's right to enforce them had been impaired, for the following reasons:

1. The City's annexation of the land changed the operation of law; service area boundaries by
2. The service area boundaries were changed by operation of a 1970 agreement between the parties;
3. People's lacked a franchise from the City to deliver electric service to the intersection;

4. People's had lost its right to serve the area by its course of conduct in allowing the City to serve similarly situated customers;
5. People's had failed to make timely objection to the City's notice of its intent to serve the intersection;
6. Duplication of facilities would result from People's' extension of service;
7. The City may serve the traffic signals at East River Road by virtue of its ownership interest in them;
8. The owner of the traffic signals and street lighting at the Broadway intersection, the Minnesota Department of Transportation, is not subject to the provisions of Minnesota's assigned service area statutes;
9. The Commission lacks the authority to grant the relief requested by People's.

The Department of Public Service intervened and supported People's requests for relief.

The matter first came before the Commission on February 2, 1990. At that time the Commission determined that this case involved many of the same issues as those in another pending matter, In the Matter of a Complaint of People's Cooperative Power Association, Inc. Against the City of Rochester Regarding Extension of Service to Continental Baking, Docket No. E-132, 299/SA-89-981. The Commission therefore consolidated the comment periods for both dockets. The matter came before the Commission again on February 23, 1990.

FINDINGS AND CONCLUSIONS

The Commission finds that the City has violated People's assigned service area, Minnesota's assigned service area statutes, and an effective Commission Order. The Commission will require the City to cease providing service to the intersections. The Commission will also refer the statutory and Order violations to the Attorney General for penalty proceedings in district court.

Each of the City's defenses will be addressed in turn.

The Effect of Annexation on Service Area Boundaries

The City's assertion that annexation changes service boundaries by operation of law is inconsistent with Minn. Stat. § 216B.44 (1988). That statute gives municipal utilities the right to acquire portions of other utilities' service areas which lie within their corporate boundaries, upon payment of appropriate compensation. Until compensation has been determined and paid, however, the

utility the municipality seeks to displace shall continue serving the area, including new customers.

There are only two circumstances under which a municipality may serve before compensation has been paid. One is when the Commission has found, after notice and hearing, that allowing the displaced utility to serve new customers would not be in the public interest. There has been no such finding here. The other is when the area in question is not receiving service from the displaced utility. That is not the case here, since the co-op has facilities in the area capable of serving the intersections and was serving the intersections before road construction necessitated temporary removal of co-op facilities.

The Commission therefore rejects the City's contention that its annexation of the land at issue changed the service area boundaries by operation of law.

The Effect of the Utilities' 1970 Agreement on their Assigned Service Areas

As part of its answer to the co-op's complaint, the City alleged that service rights to the area in question had passed to the City upon annexation under an agreement executed by the two utilities in 1970.

Description of the Agreement -- The agreement at issue consists of two resolutions passed in 1970 by the Rochester Public Utility Board and the Board of Directors of People's Cooperative Power Association. They are attached as exhibits 1 and 2. Although the resolutions were adopted before the 1974 establishment of assigned service areas, the two utilities stated their intention to rely on them when they filed their joint service area map in 1974:

. . . In areas of apparent conflict where lines of the Rochester Electric Department and People's Cooperative Power Association are intertwined, a mechanism exists for solution of these problems through an agreement for purchase of the facilities of one by the other. We propose that existing conflicts between us be settled by this means, and that future conflicts, if any should arise, be settled by this means, also. We would resort to Public Service Department resolution only when these other means failed.

September 30, 1974 Letter of James W. Taylor, Superintendent, Electric Department, Rochester Public Utility Department, attached as exhibit 3.

The parties agree that the agreement ended in 1984, upon rescission by the People's Board of Directors.

The Agreement's Effect on Service Area Boundaries and Service Rights -- The City contends that, under the agreement, no compensation was required if it annexed and decided to serve an area where there were no current co-op customers and no co-op facilities. In 1982, when the City annexed the area at issue, there were no co-op customers and no co-op facilities in the area. The

City argues it therefore acquired the right to serve the area free of charge. The City maintains this right was not affected by the 1984 termination of the agreement, even though the City did not extend service to the area until after 1984.

The Commission finds that the agreement cannot reasonably be read to support the City's interpretation. It is clear from the language of the two resolutions that their purpose was to establish guidelines for determining compensation when the City decided to annex an area, to provide electric service to it, and to negotiate compensation under the agreement instead of proceeding by eminent domain. Recourse to the agreement was at the City's discretion. The agreement preserved the City's rights to decline to serve annexed areas¹ and to acquire the co-op's service territory by eminent domain, instead of under the agreement.²

The plain language of the agreement demonstrates that the parties did not contemplate an automatic transfer of service rights (and obligations) under any circumstances. To the contrary, it took pains to make it clear that the City was not obligated to provide electric service by virtue of annexation. The agreement was merely a tool available for the use of the City in resolving compensation issues arising between the City and the co-op. The language of the agreement is clear and does not require the examination of extrinsic evidence, such as the behavior of the parties, for its interpretation. The Commission therefore rejects the City's contention that its annexation of the area before the termination of the agreement acted to transfer the right to serve the area from the co-op to the City.

In order for the 1970 agreement to be an affirmative defense to a service territory violation claim, the agreement would have had to change service territory boundaries or create an exception to service territory boundaries under Minn. Stat. § 216B.39, subd. 4 (1988) or 216B.40 (1988). The undisputed facts demonstrate that it did neither. The Commission therefore rejects the proposition that the agreement constitutes an affirmative defense to the co-op's claim.

The 1970 agreement is a statement of sentiments between the two parties. The parties agree that they will conduct negotiations regarding the City's purchase of the co-op's facilities in annexed areas the City decides to serve, before the City initiates condemnation proceedings. It is clear from the plain language of the resolutions, and from the explanatory letter filed with the Commission in 1974, that the agreement was not one to change specific service area boundaries, or even to establish specific exceptions. Instead, it represented the parties' agreement on a formula for compensation

¹ Paragraph 4 of the City's resolution reads as follows: "Nothing in this policy statement is intended to preclude a determination by the City that it is more advantageous to the City of Rochester not to purchase such facilities but to permit People's Cooperative to continue their operation within the corporate limits of the City of Rochester."

² Paragraph 5 of the City's resolution reads as follows: "The Public Utility Board by the adoption of this resolution does not intend in any way to affect the City of Rochester's power to acquire property by condemnation whenever it is deemed advisable to do so or to change in any way the measure of damages in case of such condemnation."

when the City wished to acquire co-op facilities. The City reserved the right not to serve annexed areas and the right to proceed by condemnation, if negotiations under the agreement failed. In their explanatory letter to the Commission, both parties reserved their rights to ask the Commission to resolve disputes if the dispute resolution mechanism established in the agreement failed. In short, it is clear from the language of the resolutions and the explanatory letter that the agreement memorialized the parties' joint commitment to negotiate and nothing more.

Whether the agreement would have allowed the City to acquire service rights to the annexed area without compensation at the time of annexation is not at issue. The City did not declare its intention to serve the annexed area until after the agreement ended. It was then too late for the City to assert whatever rights it may have had under the agreement. The City's argument that the agreement would have bound the co-op to allow the City to serve the area in dispute without compensation is therefore speculative and irrelevant.

This case is distinguished from another case in which the Commission found that the 1970 agreement precluded a finding that the co-op had knowingly and intentionally violated the City's assigned service area by extending service there under its interpretation of the agreement. In the Matter of a Complaint by the City of Rochester, Minnesota, Against People's Cooperative Power Association, Inc., Regarding the Extension by People's of Electric Distribution Facilities to Serve Certain Customers in Willow Center Subdivision, Docket No. E-299, 132/C-89-611, ORDER DISMISSING COMPLAINT (October 31, 1989). In that case the co-op extended service from 1976 through 1983, while the agreement was in force and effect. The City did not exercise its right under the agreement to bring the matter to the Commission at that time.

The Franchise Issue

The Commission rejects the City's claim that the co-op's lack of a franchise precludes it from serving the area in question. The service area statutes make it clear that municipal franchise requirements cannot alter service area boundaries set by the Commission. Franchise requirements can relate only to matters such as public safety, rights of way, and revenue collection. Authority over rate and service regulation, service area assignments, and securities and indebtedness is vested exclusively in the Commission. Minn. Stat. § 216B.36 (1988), emphasis added. A service area complaint is therefore not an appropriate proceeding in which to raise any claim the City may believe it has under its franchise ordinance.

The Waiver/Course of Dealings Issue

The City claimed that the co-op had established a pattern and practice of acquiescence in City extensions of service like the one at issue, thereby waiving its right to object to the one at issue. The City also claimed that it notified the co-op by correspondence in July and September of 1989 that it intended to serve the intersections and that the co-op's failure to respond constituted a waiver of its right to serve. The City also claimed that, at the least, contested case proceedings were necessary to develop the facts which the City believed constituted waiver. The Commission disagrees as a matter of law.

The very purpose of the assigned service area statutes was to put an end to this kind of dispute, in which utilities rely on informal agreements and waiver theories to determine their service area rights. The legislature determined that clear service territory boundaries were essential to ensure the orderly development of dependable, economical electric service throughout the state. Minn. Stat. § 216B.37 (1988). As long as service territories were unstable, utilities could not be expected to undertake the long term planning and investment necessary to meet the state's long term electric service needs. The legislature therefore required the Commission to establish and enforce clear service territory boundaries. Minn. Stat. §§ 216B.39, 216B.43 (1988).

The legislature also established clear procedures for changing or making exceptions to service area boundaries. The Commission may change service areas, on its own motion or at the request of a utility, after notice and hearing. Minn. Stat. § 216B.39, subd. 3 (1988). A utility may serve customers within another utility's service area upon receipt of written consent from the other utility. Minn. Stat. § 216B.40 (1988). A municipal utility may extend its service territory to include areas within its corporate boundaries which are not receiving service from another utility. Minn. Stat. § 216B.44 (1988). A municipal utility may extend its service territory to include areas within its corporate boundaries which are receiving service from another utility, after paying appropriate compensation or completing an eminent domain proceeding. Minn. Stat. §§ 216B.44, 216B.47 (1988).

These are the only means by which service areas may be changed. They cannot be changed by the informal practice of individual utilities. The Commission therefore rejects the City's waiver-course of dealings claim as a matter of law.

The Commission also rejects the claim on public policy grounds. To hold that utilities' service areas may be altered by their course of conduct toward one another would expose the public to the service area chaos the assigned service area statutes were enacted to avoid. Although the Commission entertains and often approves utilities' joint petitions to alter their service area boundaries, ultimate responsibility for setting those boundaries rests with the Commission. Utilities which rely on unwritten service area understandings which have not been approved by the Commission do so at their own risk.

The Commission concludes there is no need to conduct contested case proceedings regarding these two utilities' past dealings with one another, since those dealings could not have altered their assigned service areas in any case.

The Duplication of Facilities Issue

The City claimed, as an affirmative defense, that allowing the co-op to serve the intersections would result in unnecessary duplication of facilities and thereby violate the assigned service area statutes. The Commission disagrees.

Duplication of facilities is not at issue in this proceeding. This is a complaint proceeding, in which the co-op alleges that the City has violated its service territory. Minn. Stat. § 216B.43 (1988). It is not a defense to a service territory violation to allege that the public interest in avoiding

unnecessary duplication of facilities, or the public interest generally, justifies the violation. The issue in complaint proceedings is whether the alleged violation of the other utility's assigned service area has occurred.³

The "Utility Property" Issue

The City claimed that its 50% ownership interest in the traffic signals at the 37th Street, East River Road intersection entitled the City to serve the signals under Minn. Stat. § 216B.42, subd. 2 (1988). That provision reads as follows:

Notwithstanding the provisions in section 216B.39, any electric utility may extend electric lines for electric service to its own utility property and facilities.

Minn. Stat. § 216B.42, subd. 2 (1988).

This provision is limited to situations in which a utility wishes to serve "its own utility property and facilities." Traffic signals are not "utility property" or "utility facilities," but general City property. The City is therefore not entitled to serve the signals under Minn. Stat. § 216B.42, subd. 2 (1988), any more than an investor-owned utility could serve a non-utility subsidiary thereunder.

The Ability of the Department of Transportation to Choose its Provider of Utility Services

The City stated that the Minnesota Department of Transportation, which owns the traffic signals and street lights at one of the intersections, is not bound by the assigned service area statutes and could choose to receive service from the City if it wishes. The Department of Transportation did not appear or express any preference as to its utility provider.

³ The general public interest, and the effect of duplication of facilities on the public interest, would have been important issues had the City of Rochester chosen to seek prior approval of this service extension through an interim service petition under Minn. Stat. § 216B.44 (1988). In interim service proceedings the Commission determines whether an expanding municipal utility or the utility it seeks to displace shall serve an annexed area while the compensation due the displaced utility is being determined.

The Commission rejects the City's contention. In this context, the Department of Transportation is a utility customer. The assigned service area statute defines "customer" as "a person contracting for or purchasing electric service at retail from an electric utility." Minn. Stat. § 216B.38, subd. 2 (1988). It defines person to include "any political subdivision or agency." Minn. Stat. § 216B.38, subd. 1a (1988). It provides that the assigned utility shall have the exclusive right to provide service to "every present and future customer in its assigned service area." Minn. Stat. 216B.40 (1988). Clearly, the co-op has the exclusive right to provide service to all customers within its assigned service area, including the Department of Transportation.

The Commission's Authority to Require Cessation of Service

The City states in its answer that the Commission does not have the authority to require the City to disconnect its service to the intersections. The City cites no legal authority in support of this proposition.

The Commission disagrees. The authority to require a utility to cease providing service in violation of the service area statutes is inherent in its authority to hear and decide complaints alleging service area violations. Minn. Stat. § 216B.43 (1988).

Referral to Attorney General for Penalty Proceedings

Finally, the Commission finds that the City's extension of service to these intersections was a knowing and intentional violation of Minnesota's assigned service area statutes and of a May 23, 1989 Commission Order.

The facts surrounding the extension of service are undisputed. The City admitted that it served the intersections, that it intended to serve the intersections, and that the intersections lay within People's' assigned service area as reflected on the official service area maps. The City continued to serve the intersections, even after People's filed a complaint objecting to the violation of its service territory.

The City's actions were also in direct contravention of an earlier Commission Order intended to prevent just such behavior. On May 23, 1989 the Commission issued its ORDER DENYING INTERIM SERVICE RIGHTS TO THE CITY OF ROCHESTER, REQUIRING THE CITY OF ROCHESTER TO CEASE AND DESIST FROM PROVIDING SERVICE, AND TO SHOW CAUSE in a case entitled In the Matter of an Application by the City of Rochester, Minnesota for an Interim Service Order to Serve Certain Recently Annexed and Platted Undeveloped Lands

Within the City of Rochester Known as Viking Hills Third Subdivision and North Park Third Subdivision, Docket no. E-299, 132/SA-89-136, attached hereto as exhibit 4.

That Order rejected the City's argument that annexation by itself changes service area boundaries and explained the statutory procedure for municipal acquisition of other utilities' customers or service areas. It also cautioned the City not to extend service under questionable circumstances in the future:

3. People's shall continue to serve and extend service to new customers in all areas which the City of Rochester has annexed or shall annex within the assigned service area of People's until compensation is determined and paid unless, after notice and hearing, the Commission shall find or has already found that it would not be in the public interest for People's to extend service.

4. The City shall immediately cease and desist from providing new service within People's assigned exclusive service area on and after the date of this Order where such service has not been authorized by the Commission. . . .

6. The City shall refer all future requests for new service outside of its assigned service territory to the utility entitled to serve under law.

ORDER DENYING INTERIM SERVICE RIGHTS TO THE CITY OF ROCHESTER, REQUIRING THE CITY OF ROCHESTER TO CEASE AND DESIST FROM PROVIDING SERVICE, AND TO SHOW CAUSE,
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This complaint is the nineteenth service area dispute between these two utilities to come before the Commission since April 1988. In eighteen of these proceedings the City claimed or sought the right to serve customers in areas designated as People's' exclusive service territory on the official service area maps. This longstanding pattern of conflict over the City's desire to expand its service area led the Commission to issue the Order discussed above.

The City's extension of service to these intersections in the face of this Order, and the history it represents, constitutes a knowing and intentional violation of the Order and of the statutes it interpreted. The Commission will refer this matter to the Attorney General for penalty proceedings under Minn. Stat. §§ 216B.57 et seq.

ORDER

1. The City of Rochester shall cease providing electric service to the intersections of 37th Street Northeast and East River Road and 37th Street Northeast and North Broadway and shall allow People's Cooperative Power Association to serve the intersections.
2. The two utilities shall coordinate the City's cessation of service and People's' initiation of service to assure continuous delivery of electric service to the intersections.
3. The Commission declares that the City of Rochester's extension of service to the intersections at issue constituted a knowing and intentional violation of Minn. Stat. §§ 216B.40 and .44 (1988) and of the Commission's ORDER DENYING INTERIM SERVICE RIGHTS TO THE CITY OF ROCHESTER, REQUIRING THE CITY OF ROCHESTER TO CEASE AND DESIST FROM PROVIDING SERVICE, AND TO SHOW CAUSE in In the Matter of an Application by the City of Rochester, Minnesota for an Interim Service Order to Serve Certain Recently Annexed and Platted Undeveloped Lands Within the City of Rochester Known as Viking Hills Third Subdivision and North Park Third Subdivision, Docket no. E-299, 132/SA-89-136 (May 23, 1989).
4. The Commission requests that the Attorney General determine appropriate penalties and initiate an action to recover penalties under Minn. Stat. §§ 216B.57 et seq. (1988).
5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Lee Larson
Acting Executive Secretary

(S E A L)